No. 20-5904

IN THE

Supreme Court of the United States

TARAHRICK TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

AMIR H. ALI
DEVI M. RAO
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H Street NE, Ste. 275
Washington, DC 20002

MICHAEL CARUSO
Federal Public Defender
ANDREW L. ADLER
Counsel of Record
BRENDA G. BRYN
Ass't Fed. Pub. Defenders
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

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REPLY BRIEF FOR PETITIONER

Much is common ground here. The Government agrees that Petitioner has a "covered offense" under Section 404(a) of the First Step Act because Section 2 of the Fair Sentencing Act "modified" 21 U.S.C. § 841(b)(1)(C), the penalty statute for his crack offense. And Court-appointed Amicus does not defend the Eleventh Circuit's contrary reasoning below.

Instead, Amicus charts his own course. In doing so, he devotes much space (and rhetoric) to statutory minutiae that are not in dispute and do not affect the outcome. Stripped down, his argument is that Section 404 covers only the crack offenders sentenced under Sections 841(b)(1)(A)(iii) and (B)(iii) because those are the only offenses for which the statutory range of punishment would be lower after Section 2.

Amicus's entire argument hinges on one critical assumption: that the phrase "statutory penalties" in Section 404(a) refers to a sentencing range. But that reading wrenches the phrase out of context. Section 404(a) refers to "statutory penalties" that "were modified by section[ ] 2." And Section 2 did not modify *any* sentencing ranges. Rather, Section 2 raised the crack quantities in Sections 841(b) and 960(b), which are both entitled "Penalties." Read in context, then, "statutory penalties" refers to the "[p]enalties" statutes that Section 2 "modified." And because Section 2 modified the penalty statute in Section 841(b)(1)(C), Petitioner has a "covered offense." That resolves the case.

The invalidity of Amicus's textual argument is confirmed by the anomalies it would create. On his view, Section 404 would cover kingpins sentenced under Section 841(b)(1)(A)(iii) for trafficking kilograms of

crack. But it would exclude street-level dealers sentenced under Section 841(b)(1)(C) for selling one crack rock. That perverse regime would undermine Section 404's goal of making Section 2 retroactive to all crack offenders who were subject to the old 100-to-1 ratio.

Desperate to make his regime seem plausible, Amicus rewrites both history and federal sentencing law. He asserts that Section 841(b)(1)(C) offenders who were "affected" by the 100-to-1 ratio already received the full benefit of Section 2 through retroactive guideline Amendment 750. That argument is triply wrong.

First, the 100-to-1 ratio was embodied in the statutory drug quantities, and they served as sentencing benchmarks, adversely "affecting" all crack offenders subject to them. That includes career offenders (and others) who were later ineligible for Amendment 750 relief. They got no benefit whatsoever from Section 2.

Second, offenders who *were* eligible for Amendment 750 relief could still not receive a sentence below the amended guideline range. And they remained subject to the old statutory benchmarks. Hardly full relief.

Third, all of Amicus's reasons for excluding Section 841(b)(1)(C) offenders would *also* exclude Section 841(b)(1)(A)(iii)/(B)(iii) offenders. And his sole reason for why Congress wanted to cover those latter offenders alone would cover only a small fraction of them. Amicus's theory is plagued by inconsistencies.

Just like the kingpins sentenced under Section 841(b)(1)(A)(iii), the low-level dealers sentenced under Section 841(b)(1)(C) have a "covered offense." Both were sentenced under the 100-to-1 ratio. So both are eligible for Section 404 relief. Relief will be granted if (and only if) a judge finds that the facts warrant it.

I. Petitioner Has a "Covered Offense," and Amicus's Textual Argument Lacks Merit

Under Section 404(a), "the term 'covered offense' means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . , that was committed before August 3, 2010."

The elements of Petitioner's "offense" were: (1) possession with intent to distribute a controlled substance; and (2) crack cocaine. Thus, Petitioner agrees with the Government (Br. 23–26) that the "Federal criminal statute" here is Section 841(a) and (b)(1)(C). And Petitioner agrees with the Government (and Amicus) that "statutory penalties for which" refers to the "violation of a Federal criminal statute." The only dispute here is whether the "statutory penalties" for Petitioner's crack offense were "modified" by Section 2.

A. Section 2 "Modified" the Penalty Statute for Petitioner's Crack-Cocaine Offense

Sections 841(b) establishes a three-tiered penalty scheme for crack offenses. Those three tiers are separated by the two crack quantities contained in Sections 841(b)(1)(A)(iii) and (B)(iii). When Section 2 raised those quantities, it "modified" all three tiers, including the bottom tier in Section 841(b)(1)(C).

The reason lies in Section 841(b)(1)(C)'s text, which the Eleventh Circuit overlooked and Amicus mentions only in passing. Br. 14. That text provides the default penalties for crack "except as provided in Subparagraphs (A) [or] (B)." 21 U.S.C. § 841(b)(1)(C). That explicit cross-reference links Section 841(b)(1)(C) to Sections 841(b)(1)(A) and (B). The former provision applies only when the latter provisions do not.

Because Section 841(b)(1)(C) incorporates Sections 841(b)(1)(A) and (B), Section 2 "modified" Section 841(b)(1)(C) when it raised the quantities in Sections 841(b)(1)(A)(iii) and (B)(iii). That raised the statutory benchmarks against which Section 841(b)(1)(C) offenses are measured. SG. Br. 36–37. And it enlarged Section 841(b)(1)(C)'s scope: before Section 2, it alone covered offenses with less than 5 grams; after Section 2, that quantity became 28 grams. SG Br. 27–28.

To be sure, Section 2 did not *amend* Section 841(b)(1)(C). But due to the cross-reference, Congress had no need to amend its text to modify its scope. And Congress legislates "concisely and precisely, using neither more nor fewer words than necessary to accomplish its goals." Bipartisan Senators' Br. 13–15.

The Government agrees. It has only one semantic quibble. It observes that Section 841(b)(1)(C) does not have a "ceiling" in the sense that any crack offender "could be prosecuted" under Section 841(b)(1)(C), even if the actual quantity involved exceeds the quantity thresholds in Section 841(b)(1)(A)(iii) or (B)(iii). Petitioner agrees: prosecutors enjoy that initial discretion.

At the same time, after a defendant is charged with, and found guilty of, an offense involving 28 grams or more of crack (as found by a jury or admitted at the plea), Section 841(b)(1)(B)(iii) provides the penalties. At that point, the cross-reference displaces Section 841(b)(1)(C). Viewed that way, Section 841(b)(1)(C) does have a "ceiling." And Section 2 raised that ceiling when it raised Section 841(b)(1)(B)(iii)'s floor.

Semantics aside, Petitioner and the Government agree that Section 2 "modified" Section 841(b)(1)(C). Thus, he has a "covered offense" under Section 404(a).

B. "Statutory Penalties" Refers to the Penalty Statutes That Section 2 "Modified," Not the Sentencing Ranges That Section 2 Left Undisturbed

Because Amicus cannot dispute that Section 2 "modified" Section 841(b)(1)(C), he is forced to reframe the inquiry. Rather than asking whether Section 2 modified the penalty statute for Petitioner's crack offense, he asks whether Section 2 modified the statutory range of punishment for that offense. That redirection rests on the faulty premise that "statutory penalties" refers to a sentencing range. It does not.

1. Section 404(a) does not refer to "statutory penalties" alone. It refers to "statutory penalties" that "*were modified by section[ ] 2*." That textual qualification exposes the flaw in Amicus's argument: Section 2 did not modify *any* statutory sentencing ranges. As he acknowledges (Br. 20), the sentencing ranges in Sections 841(b) and 960(b) were exactly the same after Section 2 as they were before. That is true not just for Section 841(b)(1)(C) but for Sections 841(b)(1)(A) and (B) too. Those ranges—*e.g.*, 0 to 20 years; 5 to 40 years 20; 10 years to life—all remained the same.

But Section 2 *did* do something: it raised the crack quantities in Sections 841(b) and 960(b), both of which are entitled "Penalties." Read in context, then, "statutory penalties" must refer to the penalty statutes that Section 2 "modified" when it raised their crack quantities. If "statutory penalties" instead meant a sentencing range, then Section 404(a) would cover a null set of offenders, since Section 2 did not modify any sentencing ranges at all. And that would violate

the "elementary rule of construction that the act cannot be held to destroy itself." *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995) (quotation omitted).

Moreover, Congress knew what Section 2 did. After all, Section 404(a) expressly incorporates Section 2 and refers to the penalties that Section 2 "modified." Thus, when enacting Section 404, Congress understood that Section 2 raised the quantities in Sections 841(b) and 960(b). That must be what Congress meant in Section 404(a) by "statutory penalties" that "were modified by section[ ] 2."

That meaning is confirmed when Section 404(a) is read together with Sections 841(b) and 960(b), the objects of Section 2. As mentioned, those provisions are entitled "Penalties." And the title of Section 844(a), the object of Section 3, also includes the description "penalties." The "statutory penalties" phrase in Section 404(a) was a short-hand way of referring to these "penalties" statutes that Sections 2 and 3 "modified."

In sharp contrast to Section 2, Section 401 of the First Step Act *did* reduce the sentencing ranges in Sections 841(b) and 960(b). It reduced the enhanced statutory minimums in Sections 841(b)(1)(A) and 960(b)(1) for certain recidivists from mandatory life to 25 years, and from 20 to 15 years. First Step Act §§ 401(a)(2), (b)(1). That is telling: in the same Title of the same Act as Section 404, Congress reduced the sentencing ranges in Section 841(b) and 960(b). In light of Section 401, Congress knew what such a reduction looked like when it drafted Section 404(a). And so it knew that Section 2 had made no such reduction. Instead, Section 2 raised the crack quantities

in Sections 841(b) and 960(b), thereby modifying those "penalties" statutes for crack offenses.

2. That meaning tracks the Sentencing Commission's description of Section 2 in the eight years leading up to Section 404. Amicus ignores that historical backdrop against which Congress legislated.

In its Reason for Amendments 748 and 750, the Commission explained that Section 2 changed "the statutory penalties" for crack—not by reducing any sentencing ranges but "by increasing the quantity thresholds." U.S.S.G., App. C, vol. III, amend. 748 (Nov. 1, 2010) (reason for amend.); *id*. amend. 750 (Nov. 1, 2011) (reason for amend.); *see id*., amend. 759 (Nov. 1, 2011) (referring again to Section 2's "changes in the statutory penalties" when making Amendment 750 retroactive). (Notably, the Commission cited Sections 841(b)(1)(A), (B), *and* (C), recognizing that Section 2 affected the penalty statutes in all three tiers).

In its 2015 Report on the Fair Sentencing Act's impact, the Commission repeated that Section 2 changed the "statutory penalties" by increasing the crack quantities to "produce an 18-to-1 crack-to-powder drug quantity ratio." U.S. Sentencing Comm'n, Report to the Congress: Impact of the Fair Sentencing Act of 2010 3, 38 (Aug. 2015) (2015 Report). And the Commission reiterated that understanding in its 2018 recidivism study of crack offenders released under Amendment 750. U.S. Sentencing Comm'n, Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: 2011 Fair Sentencing Act Guideline Amendment 1 (Mar. 2018).

Congress knew about the Commission's consistent use of the phrase "statutory penalties" in the Section

2 context. The Commission transmitted its Reason for Amendments 748/750/759 to Congress pursuant to 28 U.S.C. § 994(p). It transmitted its 2015 Report to Congress pursuant to Section 10 of the Fair Sentencing Act. And the Commission issued its 2018 recidivism study just months before Congress passed Section 404. That was the backdrop to Section 404.

Then, in Section 404(a) itself, Congress incorporated the Commission's "vernacular." *United States v. Davis*, 961 F.3d 181, 190 n.7 (2d Cir. 2020). In doing so, Congress is presumed to have adopted the Commission's understanding of Section 2. *See* Pet. Br. 27–28 (citing *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978)). Indeed, Congress would not use the Commission's "statutory penalties" phrase only to give it a different meaning. And the Commission never suggested that Section 2 changed the "statutory penalties" by lowering any sentencing ranges. The reason why is manifest: that's not what Section 2 did. All it did was raise the crack quantities in Sections 841(b)/960(b). As the author of Section 2, Congress knew that well.

3. Had Congress sought to depart from that settled understanding of "statutory penalties" in the Section 2 context, Congress could have easily done so. After all, it could have simply used the phrase "statutory sentencing range" or "statutory range of punishment." In the sentencing context, many federal statutes speak in terms of a sentencing "range." *See, e.g.*, 18 U.S.C. §§ 3553(a)(4), (b)(1), (b)(2)(A), (c); 18 U.S.C. § 3582(c)(2); 18 U.S.C. §§ 3742(a)(3), (b)(3), (e)(3), (f)(2), (g), (i); 28 U.S.C. §§ 994(b), (m), (w)(1)(B). Yet, in Section 404(a), Congress instead used the broader phrase "statutory penalties," capturing the penalty statutes that Sections 2 and 3 modified.

Had Congress wanted to define a "covered offense" as one for which the sentencing ranges would be lower after Section 2, it would have also used the word "reduced," not "modified." It would be odd to say that a sentencing range was "modified" when it was merely lowered. But it makes perfect sense to say that Section 2 "modified" the penalty statutes in Sections 841(b) and 960(b) by raising their quantities.

And the text indicates that Congress deliberately declined to use the word "reduced." Congress used the word "reduce" four times in Sections 404(b) and (c), but not in Section 404(a). If "statutory penalties" truly referred to lower sentencing ranges, the word "reduce" would have also worked for Section 3, which eliminated the mandatory minimum for simple crack possession. But Congress used the broader word "modified" because "statutory penalties" refers to the penalty statutes that Sections 2 and 3 modified, not the sentencing ranges that Section 2 left undisturbed.

4. Amicus emphasizes that "penalty" means "punishment." Br. 8–9, 18. But Section 404(a) does not use the singular word "penalty." It uses the plural phrase "statutory penalties." And it qualifies that phrase: "statutory penalties" that "were modified by section[ ] 2." Given that surrounding text, the "[p]enalties" statutes that Section 2 "modified," and the Commission's vernacular in the lead-up to Section 404, "statutory penalties" must refer to the penalty statutes that Section 2 modified—not "punishment."

Regardless, those penalty statutes and the drug quantities they contain *do* affect punishment. After all, drug type and quantity primarily determine the

sentencing ranges that Amicus elevates. And by increasing the crack quantities, Section 2 reduced actual punishment. Indeed, average crack sentences decreased in the years after Section 2. 2015 Report 23. That is unsurprising. Section 2 effectively limited the crack offenders subject to Section 841(b)(1)(A)(iii)'s top-tier range. And it effectively increased the crack offenders subject only to Section 841(b)(1)(C)'s lower range. Thus, even viewed through the lens of "punishment," it would make perfect sense for Congress to say, just like the Commission before it, that Section 2 modified the "statutory penalties" by raising the crack quantities across all three penalty tiers.

* * *

Read in context, "statutory penalties" refers to the penalty statutes that Section 2 "modified," not the sentencing ranges that it left untouched. Because Amicus's argument depends on the latter meaning, his argument fails. And because he does not dispute that Section 2 "modified" the penalty statute in Section 841(b)(1)(C), Petitioner prevails. Case closed.

II. Covering Low-Level Crack Dealers Aligns With Section 404's History and Purpose

Petitioner's straightforward textual reading aligns with Section 404's straightforward purpose: to make Section 2 retroactive to *all* crack offenders who were subject to the 100-to-1 crack-to-powder ratio. Meanwhile, the infirmity of Amicus's textual reading is confirmed by the perplexing patchwork of eligibility that it would create. And his contrived effort to justify that regime implodes upon scrutiny.

A. Section 404 Made Section 2 Retroactive to *All* Crack Offenders Who Were Subject to the 100-to-1 Ratio

1. There is no question that the purpose of Section 404 was to make Section 2 retroactive. The only question is: for whom? But the answer is plain: Section 404 made Section 2 retroactive for *all* crack offenders who were subject to the 100-to-1 ratio.

Entitled "Cocaine Sentencing Disparity Reduction," Section 2 reduced the disparity between crack and powder by raising the quantities for crack. Section 2 applied prospectively to all crack offenders sentenced after its August 3, 2010 effective date. They all received the benefit of Section 2 in the form of new (and favorable) statutory benchmarks that did not exist for the crack offenders sentenced before August 3, 2010.

Section 404 remedied that temporal disparity. It placed pre-Section 2 crack offenders in the same position as post-Section 2 crack offenders. And because Section 2's new benchmarks applied to *all* crack offenders sentenced after August 3, 2010, Section 404 made Section 2 retroactive for *all* crack offenders sentenced before August 3, 2010. Selectively excluding certain pre-Section 2 offenders would be incongruous, for it would keep them in a worse position than their post-Section 2 counterparts. *See* Pet. Br. 17, 31–32.

Section 404(c) reflects that Congress wanted all crack offenders to receive one opportunity to benefit from Section 2. Section 404(c) excludes crack offenders whose "sentence was previously imposed or previously reduced in accordance with the amendments made by section[ ] 2." That excludes anyone who was originally sentenced after August 3, 2010, as well as

anyone who was re-sentenced after August 3, 2010 following a successful appeal or post-conviction motion.[*] They all received the benefit of Section 2. Likewise, Section 404(c) excludes anyone whose Section 404 motion was "denied after a complete review of the motion on the merits." They too received the opportunity to benefit from Section 2. Section 404(c) does not exclude anyone else. Why? Because no one else received the opportunity to benefit fully from Section 2's statutory benchmarks. That was the purpose of Section 404.

Revealingly, the legislators who wrote the law have confirmed that purpose in a brief to this Court in this case. *See* Bipartisan Senators' Br. 11 ("The text Congress enacted makes retroactive relief broadly available to all individuals sentenced for crack-cocaine offenses before the Fair Sentencing Act.").

2. Amicus nonetheless asserts that Congress intended to do something very different. In his view, Section 404 made Section 2 retroactive only for the most serious crack offenders sentenced under Section 841(b)(1)(A)(iii) and (B)(iii), but not for the low-level crack dealers sentenced under Section 841(b)(1)(C).

That regime would create striking anomalies. A defendant sentenced on August 2, 2010 for selling 1 gram of crack would be denied the benefit of Section 2, but an identical defendant sentenced on August 4, 2010 would receive it. Similarly, the 1-gram defendant sentenced on August 2, 2010 would be denied the

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[*] For example, after *Dorsey v. United States*, 567 U.S. 260 (2012) held that Section 2 applied to defendants who committed their offense before August 3, 2010 but were sentenced after, this Court GVR'd over 40 cases. Section 404(c) would exclude any of those defendants who were re-sentenced under Section 2's ratio.

benefit of Section 2, while a kilogram-trafficking kingpin sentenced on that same day would be eligible for Section 404 relief. In addition, the lowest-level members of a crack conspiracy would remain behind bars while the leader of that same conspiracy could obtain Section 404 relief. And one defendant convicted of two crack offenses, one under Section 841(b)(1)(A)(iii) and one under Section 841(b)(1)(C), would be eligible for Section 404 relief for the former but not the latter. *See* Br. of ACLU et al. 26–28 (discussing real cases involving such facts). The permutations are endless.

Those anomalies are further accentuated by Congress's decision to make Section 3 retroactive. Section 3 eliminated the mandatory minimum for simple crack possession, an even lower-level offense than distribution. Under Amicus's view, then, Congress intended to cover kingpins at one extreme, simple possessors at the other extreme, but not the low-level dealers in between. That is one curious carve-out. *See* SG Br. 34–35; Am. for Prosperity Br. 5, 24.

3. The consequence of Amicus's position would be a random and bizarre patchwork of eligibility. Congress did not divide up sub-categories of crack offenders and then silently arrange them in such a contradictory manner. That is especially true given that Congress and the Commission have regulated crack offenders as one cohesive group for the last three decades. *See* Pet. Br. 25–26 (summarizing the history).

In the end, Amicus's hodgepodge of coverage would undermine Section 404's simple objective: to make Section 2 retroactive to *all* crack offenders sentenced under the 100-to-1 ratio, mirroring Section 2's blanket

application to *all* crack offenders sentenced after August 3, 2010. Had Congress sought to excise a large swath of low-level crack offenders from Section 404, it would have done so clearly. The Court should decline Amicus's invitation to do what Congress did not by stitching a "crazy quilt of [eligibility], at odds with Congress' basic efforts to achieve more uniform, more proportionate sentences." *Dorsey*, 567 U.S. at 279.

B. Amicus Cannot Explain Why Congress Would Have Wanted to Single Out Low-Level Crack Dealers for Exclusion

Sensing the problem, Amicus concocts an explanation for why Congress intended to exclude low-level dealers. But his rationale finds no support in text or history; it misunderstands the nuts and bolts of federal sentencing; and it would equally exclude the Section 841(b)(1)(A)(iii)/(B)(iii) offenders that he says are covered. And as for why Congress intended to categorically cover *all* Section 841(b)(1)(A)(iii)/(B)(iii) offenders alone, Amicus offers a puzzling explanation that would capture only a small fraction of them.

* * *

First, some quick background. Pursuant to Section 8 of the Fair Sentencing Act, the Commission promulgated Amendment 750, which incorporated Section 2's 18-to-1 ratio into the Drug Quantity Table in U.S.S.G. § 2D.1.1(c). When Amendment 759 made Amendment 750 retroactive, that lowered the guideline range for most crack offenders whose range had been based on § 2D1.1(c). Those with a lower range could then seek a discretionary reduction via 18 U.S.C. § 3582(c)(2).

However, 37% of crack offenders were ineligible for Amendment 750 relief. *See* Amend. 750 (reason for

amend.). Career offenders and armed career criminals were among them. Because their guideline offense levels were based not on § 2D1.1(c) but rather their own specific Guidelines in §§ 4B1.1 and 4B1.4, Amendment 750 did not lower their guideline ranges. As a result, Section 3582(c)(2) barred them from relief. *Id*. Also barred were offenders with certain crack quantities that happened to produce the same offense levels after Amendment 750 due to how the Table was structured. That included the lowest of the low-level offenders with less than 500 milligrams, as well as those with very large kilogram quantities. *Id*.

1. The offenders who were previously ineligible for Amendment 750 relief are prime candidates for Section 404 relief. As explained below, relief under Amendment 750 was limited. But these ineligible offenders could not even seek that limited relief. They were categorically denied *any* benefit of Section 2.

Attempting to turn the tables, Amicus argues that these offenders were excluded from Amendment 750, and so should now be excluded from Section 404, because the 100-to-1 ratio did not "affect," and "had nothing to do," with them. Br. 30–32. Where to begin?

First, that explanation would exclude Section 841(b)(1)(A)(iii)(B)(iii) offenders too. After all, many of them were career offenders and armed career criminals. And Section 841(b)(1)(A)(iii)/(B)(iii) offenders with certain large quantities were also ineligible under Amendment 750. So that cannot justify categorically excluding Section 841(b)(1)(C) offenders alone.

Beyond that fatal inconsistency—the first of three—the fundamental flaw in Amicus's argument is that it ignores the pervasive effect of the 100-to-1 ratio. He

assumes that the ratio "affected" crack offenders only when it affected their guideline range. That is wrong. The ratio infected the statutory regime under which all pre-Section 2 crack offenders were sentenced.

The drug quantities in the statute embodied the ratio, and they served as benchmarks that influenced the discretionary sentencing determination. *See* Pet. Br. 16–17, 19–20, 30–31. While Amicus criticizes that anchoring effect as speculative (Br. 31), it is common sense and common knowledge. Lower courts (Pet. Br. 31), the United States (Br. 36–37), and former federal judges and prosecutors all confirm that courts assess the severity of a drug offense by relating the defendant's quantity to the statutory quantities. *See generally* Br. of Former Federal Judges, Former Federal Prosecutors, and NACDL. In fact, this Court has directed courts to consider those statutory benchmarks as part of the mandatory 18 U.S.C. § 3553(a) analysis. *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

Career offenders illustrate the point. Although the 100-to-1 ratio did not affect their guideline range, it still affected their sentences. Take, for example, two identical Section 841(b)(1)(C) career offenders—one with 4 grams of crack, and one with 4 grams of powder. Under § 4B1.1(b), their guideline ranges would have been the same, determined by the statutory maximum, not the ratio in § 2D1.1(c). But the ratio in the *statute* would have led the sentencing judge to view the crack offense as far more serious than the powder offense. And that would have almost certainly resulted in a higher sentence. In that respect, the 100-to-1 ratio communicated to sentencing judges that Congress wanted crack offenses to be penalized severely. Section 2 softened that message.

Data from before Section 404 shows yet another way in which the 100-to-1 ratio affected career offenders. Courts routinely sentenced them below the enhanced career-offender guideline range. *See* U.S. Sentencing Comm'n, Report to the Congress: Career Offender Sentencing Enhancements 22–23 (Aug. 2016). And those downward variances were influenced by the unenhanced guideline range, which was based on § 2D1.1(c) and, in turn, the statutory ratio. For example, those classified as career offenders based on prior drug offenses received an average sentence "nearly identical" to the bottom of the unenhanced guideline range. *Id*. at 3, 27, 35, 44. That convergence reflects that the statutory ratio influenced their sentences.

In Section 404 proceedings, career offenders can now point not only to Section 2's new statutory benchmarks but also to their (now-lower) unenhanced guideline range based on Section 2's ratio. Petitioner did precisely that. In his Section 404 motion, he emphasized that, although his career-offender range of 188–235 months did not change, his unenhanced guideline range had dropped from 37–46 months to 18–24 months. At sentencing, the low-end of his career-offender range was 5 times higher than the low-end of his unenhanced range; now, it is 10 times higher. Dist. Ct. Dkt. No. 47 at 6–7, 9; *see* Pet. Br. 11.

Finally, career offenders make up more than half of those who have obtained Section 404 relief. U.S. Sentencing Comm'n, The First Step Act of 2018: One Year of Implementation 5, 44, 70 (Aug. 2020); *see* Pet. Cert. Reply App. 1a–2a (compiling Section 841(b)(1)(C) examples). That reflects the pervasive effect of the statutory benchmarks. After all, Section 404(b) directs courts to impose a sentence "as if" Section 2 had been

in effect. If the 100-to-1 ratio was "irrelevant" to career offenders, as Amicus claims (Br. 30–32), they would not be obtaining the lion's share of relief. But they are because, although the ratio did not determine their applicable guideline range, it still influenced the discretionary sentencing determination.

* * *

In short, Amicus ignores the pervasive effect of the 100-to-1 ratio. It "affected" all crack offenders sentenced under that statutory regime. And those who were ineligible for Amendment 750 relief have been completely denied the benefit of Section 2. They are the *last* people who should be excluded from Section 404. That is especially true for Section 841(b)(1)(C) career offenders, who received lengthy sentences for small crack quantities. Amicus has it backwards.

2. Then there are the Section 841(b)(1)(C) crack offenders who *were* eligible for Amendment 750 relief. As to those offenders, Amicus argues that they already received the full benefit of Section 2's lower ratio and should therefore be excluded from Section 404.

But Section 841(b)(1)(A)(iii)/(B)(iii) offenders also received Amendment 750 relief. So that rationale cannot justify excluding Section 841(b)(1)(C) offenders alone. That is fatal inconsistency number two.

Amicus also overlooks another basic but critical point: relief under Amendment 750 was strictly circumscribed. Section 3582(c)(2) requires that any retroactive guideline reduction be "consistent with applicable policy statements issued by the Sentencing Commission." And the applicable policy statement in the Guidelines precludes a reduction to "less than the minimum of the amended guideline range." U.S.S.G.

§ 1B1.10(b)(2)(A). In *Dillon v. United States*, 560 U.S. 817 (2010), the Court held that this limitation was binding notwithstanding *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory. Thus, when seeking Amendment 750 relief, the law squarely precluded crack offenders from receiving a variance below the amended guideline range.

Section 404, by contrast, imposes no such limitation on relief. So even crack offenders who obtained *maximum* relief under Amendment 750 to the low end of the amended guideline range can obtain further relief under Section 404. Thus, it is inaccurate for Amicus to suggest that crack offenders received complete relief under Amendment 750. They absolutely did not.

Exacerbating that limitation, crack offenders seeking Amendment 750 relief were still subject to the old statutory benchmarks based on the 100-to-1 ratio. After all, the Commission could not repeal the statute. Under Section 404, however, those offenders can now benefit from Section 2's new statutory benchmarks. Those benchmarks could support a downward variance for those who previously obtained maximum relief under Amendment 750. And they could support a further reduction for those who previously obtained only a partial reduction under Amendment 750.

That dynamic explains why Section 404 did not exclude crack offenders who previously received relief under Amendment 750. Section 404(c) excludes those whose sentences were previously imposed or reduced "in accordance with the amendments made by section[ ] 2." But it does not exclude offenders who previously obtained relief under Amendment 750, a dif-

ferent "amendment." *See* SG Br. 41–43. Congress recognized what Amicus does not: those offenders never got the benefit of Section 2's *statutory* benchmarks.

* * *

In short, Congress did not intend to exclude *all* Section 841(b)(1)(C) offenders just because *some* of them received limited relief under Amendment 750. Amicus's contrary rationale would equally exclude the Section 841(b)(1)(A)(iii)/(B)(iii) offenders who received Amendment 750 relief. It would strip them all of potential relief that was legally unavailable before. It would deny them the benefit of Section 2's new statutory benchmarks. And it would improperly expand Section 404(c)'s narrow textual "[l]imitation."

3. Not only does Amicus lack a coherent explanation for why Congress would have wanted to categorically *exclude* only Section 841(b)(1)(C) offenders; he also lacks a coherent explanation for why Congress would have wanted to categorically *include* only Section 841(b)(1)(A)(iii)/(B)(iii) offenders. He offers only one reason: Section 841(b)(1)(A)(iii)/(B)(iii) offenders who were "sentenced *at* the statutory mandatory minimum" could not obtain relief under Amendment 750. Br. 30, 34 (emphasis added).

First notice what Amicus is *not* arguing. He does not contend that Congress intended to cover Section 841(b)(1)(A)(iii)/(B)(iii) offenders merely because they were *subject* to a mandatory minimum. Nor could he. As the Government has explained (Br. 42), anyone subject to (but not sentenced at) a mandatory minimum would be "affected" by the 100-to-1 ratio only by virtue of its statutory benchmarks. And because Section 841(b)(1)(C) offenders were "affected" by the ratio

in that same manner, that could not justify covering Section 841(b)(1)(A)(iii)/(B)(iii) offenders but excluding Section 841(b)(1)(C) offenders.

Thus, Amicus's explanation is limited to offenders who received a sentence *at* a mandatory minimum. But there is an obvious problem: that would cover only a fraction of Section 841(b)(1)(A)(iii)/(B)(iii) offenders. Yet Amicus simultaneously claims that they *all* are covered. That is fatal inconsistency number three.

Amicus's rationale would also render Section 404 largely ineffectual. When Congress enacted Section 404 in December 2018, any pre-August 3, 2010 offender with a 5-year mandatory minimum sentence was long released. And any with a 10-year mandatory minimum was also released or at the tail end of their sentence. That leaves those who were sentenced at an *enhanced* mandatory minimum. *See* 21 U.S.C. § 851. But in the years preceding Section 2, less than 20% of all crack offenders received such an enhancement. U.S. Sentencing Comm'n, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 259 (Oct. 2011). Under Amicus's rationale, they would be the only crack offenders who Congress intended to target in Section 404.

But Congress did not enact Section 404—a centerpiece of landmark criminal justice reform—to afford a small fraction of the worst crack offenders a chance at relief. It enacted Section 404 to ameliorate the systemic racial injustice and mass incarceration that the 100-to-1 ratio exacerbated. *See* Bipartisan Senators' Br. 3–11; Br. of Am. Conservative Union et al. 18–22; Br. of D.C. & 18 States 4–18. To do so, Section 404 afforded *all* crack offenders sentenced under the 100-

to-1 regime one opportunity for a discretionary sentence reduction. Amicus's position would subvert rather than effectuate that commendable policy objective. In place of that bright-line regime, his position would substitute a senseless patchwork of eligibility that would spawn new anomalies, eroding rather than restoring confidence in the criminal justice system.

* * *

Amicus's inability to explain why Congress would have wanted to exclude Section 841(b)(1)(C) offenders reinforces that his textual argument is incorrect. To resolve this case, the Court should simply hold that: (1) "statutory penalties" refers to the penalty statutes that Sections 2 and 3 modified; and (2) Section 2 "modified" Section 841(b)(1)(C), the penalty statute for Petitioner's crack offense—making that offense a "covered offense." Accordingly, he is eligible for a discretionary sentence reduction under Section 404.

CONCLUSION

The Eleventh Circuit's judgment should be reversed.

AMIR H. ALI
DEVI M. RAO
RODERICK & SOLANGE
MACARTHUR JUSTICE
CENTER
501 H Street NE, St. 275
Washington, DC 20002
(202) 869-3434

MICHAEL CARUSO
Federal Public Defender
ANDREW L. ADLER
Counsel of Record
BRENDA G. BRYN
Ass't Fed. Pub. Defenders
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

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